(6) (3)

Nos. 89-196 and 89-394

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RAILROAD COMMISSION OF TEXAS,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

WALKER OPERATING CORPORATION, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF IN OPPOSITION OF RESPONDENTS DORCHESTER MASTER LIMITED PARTNERSHIP, NATURAL GAS PIPELINE COMPANY OF AMERICA, AND NORTHERN NATURAL GAS COMPANY, DIVISION OF ENRON CORP.

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QUESTIONS PRESENTED

1. Whether the Federal Energy Regulatory Commission's authority over interstate wholesale sales of natural gas empowered it to examine subsurface facts and state statutes and regulations in deciding whether certain sales were made in violation of the pricing provisions of the Natural Gas Policy Act and the abandonment provisions of the Natural Gas Act.

2. Whether a federal agency is required to defer its proceedings in favor of a state agency's proceedings where federal regulatory questions primarily are involved.

3. Whether an order to show cause, which made no findings of fact or conclusions of law, but which referred specifically to conduct later found to be lawful, gave the respondents named in that order adequate notice of the nature of the proceedings.

RULE 28.1 DISCLOSURE

A listing of parent companies, subsidiaries, and affiliates of respondents appears in the respondents' appendix at pages 1a to 8a.

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Dorchester Master Limited Partnership, Natural Gas Pipeline Company of America, and Northern Natural Gas Company, Division of Enron Corp., respondents in the captioned cases, respectfully request that this Court deny the petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit, which is reported at 874 F.2d 1320 (1988) (Pet. App. Vol. 1 at A1 to A41).

STATEMENT

One of Congress' responses to the natural gas shortage prevalent in the 1970s was enactment of the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. §§ 3301 *et seq.* By establishing higher price ceilings for new gas, Congress sought to provide gas producers an economic incentive to find and develop new reserves. *See, e.g.*, H. Rep. No. 95-1752, 95 Cong. 2d Sess. at 68, 80, *reprinted at* 1978 U.S. Code Cong. & Admin. News 8983 at 8984-85, 8997. *See also* 123 Cong. Rec. 30373 (September 22, 1977). However, some producers, including the 34 oil well operators in this case,[1] attracted by the NGPA incentives, devised a scheme to sell old gas at the considerably higher NGPA new gas prices.

Typically, the oil operators secured oil leases on the same land in the Panhandle Field in Texas on which Dorchester Gas Producing Company ("Dorchester") also held gas leases and from which Dorchester had produced and sold "dedicated" natural gas pursuant to federal certificate authority for more than 35 years to Northern Natural Gas Company ("Northern"), an interstate pipeline; because such gas was classified under the NGPA as "committed or dedicated to interstate commerce," NGPA § 2 (18), 15 U.S.C. § 3301(18) (App. at 15a), it could be sold only at or below the low ceiling prices specified under NGPA § 104, 15 U.S.C. § 3314 (App. at 26a).[2]

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[1] Of the original 37 oil well operators named as respondents in the Federal Energy Regulatory Commission's show cause order, 34 are petitioners for writ of certiorari in No. 89-394. These 34 oil well operators and the Railroad Commission of Texas are referred to jointly as "petitioners" and individually as "RCT" and the "oil operators."

[2] For old gas qualifying under NGPA § 104, Congress retained the pricing structure developed under the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717 *et seq.* As a result, there are 15 subcategories of prices under § 104. Most of the gas sold by Dorchester to Northern qualifies as "flowing gas—large producer," although some of Dorchester's gas also qualifies under NGPA § 108, 15 U.S.C. § 3318 (App. at 29a), as "stripper well natural gas." *See also* 18 C.F.R. § 271.101 (App. at 49a).

The oil operators generally completed their wells initially in the granite wash or fractured granite formations (the deepest formations in the field), produced small amounts of oil and casinghead gas, classified the wells as oil wells,[3] and claimed entitlement to NGPA § 103 prices, 15 U.S.C. § 3313 (App. at 24a). Then, these producers later would perforate the shallower brown dolomite formation, the main gas-bearing formation, which was (and is) the sole source tapped by Dorchester's wells, produce vastly greater volumes of gas, and claim that the wells were producing additional "casinghead gas" for which they also would charge their purchasers § 103 prices.[4] The problem was that the gas they took from the dolomite formation and sold mainly to intrastate purchasers was the same gas that otherwise would have been produced by a Dorchester gas well and sold to Northern at the lower § 104 prices applicable to dedicated gas.[5]

After a preliminary investigation by its Enforcement Staff, the Federal Energy Regulatory Commission

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[3] An operator obtains an oil well classification simply by filing a self-certifying Form W-2 with the RCT.

[4] Thirty-four of the original 37 oil operators made sales to intrastate purchasers, while three made sales exclusively to Northern. In all instances, however, the sales prices exceeded the limits of NGPA § 104.

[5] Under Texas law, an oil well must produce at least one barrel of oil for every 100,000 cubic feet of gas. Tex. Nat. Res. Code Ann. § 86.002(b) (Vernon 1978) (Pet. App. Vol. 3 at F-16). Because many Panhandle Field oil wells produced very little or even no oil, some operators, including 28 involved in this proceeding, installed refrigeration or low temperature extraction (LTX) units on their leases. By cooling the gas produced by these "oil" wells, the refrigeration units manufactured natural gas liquids. The operators counted these manufactured liquids (sometimes called "white oil") as crude oil in order to obtain or maintain their oil well classifications. In 1985, the RCT banned the counting of the liquid product of refrigeration units as crude oil for well classification purposes. RCT Oil and Gas Docket No. 10-77,314, Final Order (May 13, 1985). The RCT's order was upheld on appeal. *Hufo Oils v. Railroad Comm. of Texas*, 717 S.W.2d 405 (Tex. App. Austin 1986), *writ denied* (March 22, 1989).

("FERC") ordered the oil operators to show cause why they should not be held in violation of the pricing provisions of NGPA § 504, 15 U.S.C. § 3414 (App. at 39a), and the abandonment provisions of NGA § 7(b), 15 U.S.C. § 717f(d) (App. at 10a), by virtue of their sales of dedicated gas to third parties. *Stowers Oil & Gas Co.*, 26 FERC (CCH) ¶ 61,207 (1984) (App. at 51a). After full public hearings, the presiding administrative law judge ("ALJ") decided on the basis of "overwhelming" evidence, 30 FERC (CCH) ¶ 63,017 at 65,048, that the oil operators were violating those statutes and ordered them to cease their violations. 30 FERC (CCH) at 65,049. In Opinion No. 239, FERC affirmed the ALJ's recommended decision. 32 FERC (CCH) ¶ 61,043 at 61,136. Requests for rehearing and stay later were denied. 32 FERC (CCH) ¶ 61,207 at 61,427. By determining that statutory violations had occurred, FERC concluded Phase 1 of the case. FERC then began Phase 2 to decide how those violations should be remedied.

On review, the United States Court of Appeals for the Tenth Circuit affirmed FERC's Phase 1 orders in full. *Walker Operating Corp. v. FERC*, 874 F.2d 1320 (10th Cir. 1989). No Phase 2 orders were before the court.[6]

1. FERC Opinion No. 239

In Opinion No. 239, FERC made three findings on which its decision rested: (1) any casinghead gas sold by the oil operators is not dedicated to interstate commerce, but all other gas sold from their wells is so dedicated, 30 FERC (CCH) at 65,046; (2) only casinghead gas sold by the oil operators qualifies for incentive pricing under NGPA § 103, 30 FERC (CCH) at 65,047; and

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[6] FERC only recently issued its order on rehearing in Phase 2. *Stowers Oil & Gas Co.*, 48 FERC (CCH) ¶ 61,230 (Opinion No. 307-A 1989), *appeal docketed sub nom., Northern Natural Gas Co. v. FERC*, No. 89-1512 (D.C. Cir. Aug. 24, 1989); *Texaco Producing Inc. v. FERC*, No. 89-1593 (D.C. Cir. Sept. 22, 1989); and *Stowers Oil & Gas Co., et al. v. FERC*, No. 89-4701 (5th Cir. Sept. 14, 1989).

(3) most of the gas the oil operators sold was not casinghead gas. 30 FERC (CCH) at 65,048.

Under NGPA § 601(a)(1)(A), 15 U.S.C. § 3431(a)(1)(A) (App. at 44a), FERC retains jurisdiction over gas committed or dedicated to interstate commerce before the Act was passed, but only to the extent that such gas does not qualify for incentive pricing under NGPA §§ 102(c), 103(c) or 107(c)(1), (2), (3), or (4), 15 U.S.C. §§ 3312(c), 3313(c), 3317(c)(1), (2), (3), or (4) (App. at 17a, 24a, and 27a). Thus, the issue of what gas remains subject to FERC's NGA jurisdiction is dependent in the first instance upon the coverage of a given well category determination. The scope of the oil operators' well category determinations accordingly was the primary focus of the proceeding.[7]

The oil operators sought and received NGPA § 103 well category determinations for their sales of casinghead gas. In obtaining these determinations, the oil operators certified, among other things, that their wells were not completed within an existing proration unit, *i.e.*, that each of their oil wells was the first well in a new proration unit. NGPA § 2(8)(A), 15 U.S.C. § 3301(8)(A) (App. at 14a), defines "proration unit" as "any portion of a reservoir, as designated by the State [regulatory] . . . agency . . ., which will be effectively and efficiently drained by a single well." In light of this provision, FERC not only was authorized to look to Texas law and RCT regulations to ascertain the scope of the oil operators' § 103 well category determinations, it was required to do so.

The result of FERC's review of applicable Texas law and regulations was the conclusion that the State had vertically divided the reservoir into two distinct proration units: (1) the portion of the reservoir effectively and efficiently drained by an oil well, *i.e.*, the oil and casinghead gas producing portion, which lies at or below the

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[7] The NGPA § 103 issue is the only one which affects all oil operators who were show cause respondents before FERC and are petitioners for certiorari.

gas-oil contact; and (2) the portion of the reservoir effectively and efficiently drained by a gas well, *i.e.*, the gas-only producing portion, which is situated above the gas-oil contact. 30 FERC (CCH) at 65,048.

Once the scope of the well category determinations was identified, *i.e.*, embracing only casinghead gas, 30 FERC (CCH) at 65,047, FERC—as part of its enforcement responsibility—undertook to determine whether as a factual matter the gas volumes sold by the oil operators at § 103 prices were covered by their § 103 well category determinations, *i.e.*, the extent to which the oil operators sold casinghead gas.

FERC found that most of the gas sold by the oil operators was not casinghead gas but was gas produced from above the gas-oil contact from the gas-only producing portion of the reservoir. Thus, the gas sold by the oil operators at § 103 prices was not produced from the new proration units assigned to their oil wells but from the existing proration units assigned to Dorchester's gas wells. 30 FERC (CCH) at 65,048. Once this fact was established, Texas law essentially became immaterial to the § 103 inquiry. In other words, where a second well is completed in an existing proration unit, gas produced from that proration unit by the second well is ineligible for § 103 pricing unless the state agency explicitly finds that the second well was necessary to effectively and efficiently drain the proration unit. NGPA § 2(8), 15 U.S.C. § 3301(8) (App. at 14a); 18 C.F.R. § 271.305 (App. at 49a). As the RCT did not make that finding for any of the oil operators' wells, 30 FERC (CCH) at 65,047, there was no conceivable basis to support § 103 pricing for the gas the oil operators produced and sold from the existing proration units assigned to the Dorchester gas wells.

Whether sales of such gas to intrastate buyers also constituted unlawful diversions in contravention of NGA § 7(b) depended on whether that gas previously was dedicated to interstate commerce. Resolution of the latter

question necessarily entailed examination of Dorchester's certificate and its 1952 contract covering the sale of gas to Northern. FERC's review of these documents resulted in its conclusion that all gas other than casinghead gas was dedicated to interstate commerce. 30 FERC (CCH) at 65,046. This conclusion was not challenged below.

Having determined the scope of dedication was all gas other than casinghead gas, it was incumbent on FERC to decide whether the gas sold to intrastate purchasers was in fact casinghead gas. Consulting Texas law and RCT regulations, 30 FERC (CCH) at 65,046, for federal law purposes, FERC adopted verbatim the State's statutory and regulatory definition of casinghead gas: "any gas or vapor indigenous to an oil stratum and produced from the stratum with oil." Tex. Nat. Res. Code Ann. § 86.002 (10) (Vernon 1978) (Pet. App. Vol. 3 at F-17); Title 16, Texas Admin. Code § 3.69 (Pet. App. Vol. 3 at G-22). Gas satisfying the definition must by necessity be produced from completion locations at or below the gas-oil contact. As noted above, FERC found that most of the gas sold by the oil operators was not casinghead gas produced from completion locations at or below the gas-oil contact but the same gas that otherwise would have been produced by Dorchester's gas wells. As all gas other than casinghead gas was dedicated to interstate commerce under the NGA, gas other than casinghead gas could not be sold to a purchaser except Northern without FERC's prior approval under NGA § 7(b); the oil operators' sales of such gas to intrastate purchasers therefore were held to violate NGA § 7(b). 30 FERC (CCH) at 65,048.

2. The Court of Appeals Decision

In its unanimous decision affirming Opinion No. 239, the three-judge panel of the Tenth Circuit first addressed the oil operators' and aligned petitioners' jurisdictional arguments. The court traced the demarcation of authority between federal and state agencies concerning natural gas regulation from pre-NGA times through post-NGPA decisions of this Court. 874 F.2d at 1325-28. Focusing

on NGA § 1(b), 15 U.S.C. § 717(b) (App. at 9a), the court of appeals observed that state regulation under the "production or gathering" exemption does not bar legitimate federal regulatory action clearly delegated to FERC by Congress. Indeed, the court noted that comprehensive federal authority over prices paid for gas producers' interstate sales was preserved by the NGPA, *i.e.*, the NGPA did not augment the authority of states in this area. 874 F.2d at 1327.

Considering in this context the oil operators' contention that NGA § 1(b) barred FERC from ascertaining the scope of their well category determinations and of Dorchester's certificate, the court rejected this argument because in so acting FERC was engaged in an undeniably legitimate activity: "regulating the price ceilings of sales of natural gas in interstate commerce." 874 F.2d at 1328. In this respect, the court found that the ALJ's examination of geological and other subsurface factors, pertinent contracts, Texas statutes, and RCT regulations was necessary background for application of relevant federal statutes and therefore within FERC jurisdiction. 874 F.2d at 1328-30.

To the oil operators' argument that even if it had jurisdiction, FERC, under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), should have abstained in deference to Texas forums, the court responded that because here, unlike *Burford*, a federal regulatory issue was being resolved, abstention was unnecessary. 874 F.2d at 1330-31. Further, the court found that FERC merely was taking the Texas statutes and regulations at face value, and as a matter of fact did stay its proceedings to allow the RCT time to decide certain state law questions. 874 F.2d at 1330-31 and n. 14.

The court of appeals next rejected the oil operators' attacks on the evidentiary sufficiency for FERC's findings of fact, including the finding that the oil operators were selling gas produced from above the gas-oil contact (a predicate for the conclusion that most of the gas they were selling was dedicated gas from a Dorchester prora-

tion unit). The court found no basis for questioning FERC's finding that the evidence was "totally persuasive," resting on "accepted scientific principles of geology, chemistry and reservoir engineering." The court thus ruled that FERC's factual findings satisfied the statutory substantial evidence standard of review. 874 F.2d at 1331-32.[8]

Reviewing the oil operators' claim that FERC drew erroneous conclusions regarding Texas law, the court held that FERC acted reasonably in adopting verbatim the definition of casinghead gas from the relevant Texas statute and regulation and in using a gas-oil contact to determine whether casinghead gas was being sold. In these respects, the court found overwhelming support for FERC's definitional position, including persuasive expert scientific and engineering testimony, recent Texas judicial opinions, and the January 1989 Final Order in the RCT's Panhandle Field proceedings. 874 F.2d at 1332-34.

The court then rebuffed the oil operators' argument that all gas they produced was removed by NGPA § 601 from FERC jurisdiction because their wells were determined by the RCT to be NGPA § 103 wells. The court reasoned that FERC properly regarded those well category determinations as valid to the extent they covered casinghead gas. However, FERC's conclusion that those determinations could not remove dedicated gas from NGA jurisdiction also was proper, the court said, because the NGPA precludes § 103 prices attaching to gas sold from a well located within a preexistent proration unit. As the oil operators were producing gas from locations within Dorchester's proration units, such gas was not entitled to § 103 treatment, either for pricing or jurisdictional purposes, the court found. 874 F.2d at 1334-36.

Additionally, the court addressed the oil operators' contention that all their gas was § 103 gas because of the

[8] Petitioners for certiorari do not seek review of this conclusion.

RCT's alleged implicit finding that their wells were necessary to effectively and efficiently drain Dorchester's proration units. Because the applicable federal regulation requires any such finding to be explicit, and as no explicit finding was made, the court dismissed this argument. 874 F.2d at 1336-37.[9]

After affirming FERC's conclusions of law on the basis of NGPA legislative history and other factors, 874 F.2d at 1337, and approving FERC's reasoning process as having articulated clearly a rational connection between its findings and conclusions, 874 F.2d at 1337-38, the court examined the oil operators' allegations of procedural unfairness. At issue was interpretation of the scope of FERC's show cause order. The court agreed with FERC's position that because the show cause order referred, among other things, to the levels at which the oil operators perforated their wells, the inquiry was set broadly enough to encompass the concept of the gas-oil contact; the oil operators thus were held to have had adequate notice of the theory under which FERC proceeded. 874 F.2d at 1338.

REASONS WHY THE PETITIONS SHOULD BE DENIED

I. Petitioners do not raise any special and important reasons justifying this Court's review of the court of appeals decision.

Under Rule 17.1 of this Court's rules, review on writ of certiorari is a matter of judicial discretion, to be granted only when there exist "special and important" reasons calling for the exercise of the Court's supervisory powers. Although petitioners make passing reference to reasons for granting the writ,[10] those reasons go largely unexplained. Instead, petitioners simply reargue the merits of issues addressed by both FERC and the court of appeals. While those issues may have sub-

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[9] Petitioners for certiorari do not seek review of this conclusion.

[10] RCT at 4-6; the oil operators incorporate by reference the reasons advanced by the RCT. Oil Operators at 8.

stantial importance to the particular parties involved in the proceedings below, petitioners have not demonstrated, nor can they demonstrate, that those issues are of such wide import under the Constitution or laws of the United States that a grant of plenary review of the decision of the court of appeals is necessary.

The decision of the court of appeals does not conflict with the decisions of any other court of appeals, any state court, or this Court. Similarly, the decision of the court of appeals does not conflict with FERC's orders; the court of appeals affirmed the agency in all respects. This case presents no important constitutional questions, nor does it raise any important federal questions nor any questions that are likely to arise again. In fact, this case is somewhat of an historical anomaly. The leasing practices that resulted in the severance of the gas and oil interests that, in turn, resulted in gas and oil wells occupying the same surface acreage, were peculiar to the Panhandle Field. More importantly, Congress recently passed legislation that eventually eliminates all wellhead natural gas price controls as well as FERC's remaining certificate and abandonment authority over wellhead natural gas sales. Natural Gas Decontrol Act of 1989, Pub. L. 101-60 (July 26, 1989). The economic incentive to disguise old gas as new no longer exists, and in the future FERC may not have occasion to enforce NGPA § 504 or NGA § 7(b) as it did in the proceedings below.[11]

II. Court decisions regarding § 1(b) of the Natural Gas Act do not need clarification.

The RCT argues this Court should review the judgment of the court of appeals because "the courts have not clearly defined the line of demarcation between federal and state jurisdiction" under § 1(b) of the NGA. RCT at 4. The RCT does not identify the decisions that

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[11] Decisions by state courts regarding title to casinghead and non-casinghead gas and by the RCT regarding the use of refrigeration units also have discouraged conduct similar to that of the oil operators in this case.

require such clarification or explain why they are not clear but instead quotes a number of cases in which the courts have delineated very specifically the scope of FERC's and the states' authority under § 1(b), including this Court's recent decision in *Northwest Central Pipeline Corp. v. State Corp. Comm. of Kansas*, —— U.S. ——, 109 S. Ct. 1262 (1989). Thus, rather than pointing out any ambiguity in prior decisions of this Court or the courts of appeals, the RCT proceeds to argue the merits of the question whether FERC overstepped its jurisdictional boundary.

Under § 1(b) of the NGA, FERC has exclusive jurisdiction over, among other things, "the sale in interstate commerce of natural gas for resale." 15 U.S.C. § 717(b) (App. at 9a). FERC's Natural Gas Act jurisdiction encompasses regulation of market entry and exit through FERC's power to issue certificates of public convenience and necessity and to authorize the abandonment of certificated service. NGA § 7, 15 U.S.C. § 717f (App. at 10a). FERC's powers also extend to enforcing the wellhead price ceilings established under Title I of the NGPA. NGPA § 504, 15 U.S.C. § 3414 (App. at 39a). However, FERC's jurisdiction does not extend to the "production or gathering" of natural gas, a regulatory role reserved to the states." *Northwest Central Pipeline Corp.*, 109 S.Ct. at 1271-72.[12]

As recognized by the court of appeals, FERC's Opinion No. 239 properly addressed questions of pricing, dedication, and abandonment arising under the NGA and NGPA. In discharging its statutory responsibilities, FERC examined the geology of the field, information re-

[12] Although *Northwest Central* is a useful guide to the meaning and scope of NGA § 1(b), it is not analogous to the FERC proceedings below. In *Northwest Central*, the Kansas Supreme Court held that a Kansas Corporation Commission proration order was not preempted by federal law and this Court affirmed. Here, neither FERC nor the 10th Circuit determined whether the NGA or NGPA preempted any state statute, regulation, or RCT order. FERC referred to and utilized state law in ruling on questions of federal law within its exclusive jurisdiction.

lating to the production of gas by both Dorchester and the oil operators, and various state statutes, rules, and regulations. Petitioners seize on the scope of FERC's evidentiary inquiry as proof that the agency violated the "production or gathering" exemption of NGA § 1(b). RCT at 15-16. This argument misstates the law and mischaracterizes FERC's decision.

FERC's inquiry into Panhandle Field geology, gas production, and matters of state law arose primarily for two reasons. First, as explained *supra* at pp. 5-6, the major focus of the FERC proceeding was the scope of the oil operators' § 103 well category determinations. Because the term "proration unit" as used in NGPA § 103 is defined in terms of state law, FERC correctly deferred to Texas law on this issue. In addition, in deciding as a factual matter whether the gas sold by the oil operators at § 103 prices was covered by their § 103 well category determinations, FERC necessarily examined well completion and production information. Second, the oil operators attempted to justify their actions in significant part on their purported compliance with state law.[13] By seeking to shield their activities from federal scrutiny by relying on their own interpretation of state law, the oil operators invited FERC to test the validity of their posi-

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[13] For example, the oil operators relied on the "oil well defense." They reasoned: Our § 103 determinations cover casinghead gas. Under state law, casinghead gas is all gas produced from an oil well. Therefore, our § 103 determinations must cover all gas produced from our oil wells. FERC refuted this argument, as have the RCT and the Texas state courts (*see Amarillo Oil Co. v. Energy-Agri Products, Inc.*, 1989 Westlaw 19057, No. C-6649 (Tex. March 8, 1989); *Dorchester Gas Producing Co. v. Harlow Corp.*, 743 S.W.2d 243, 250-251, 258 (Tex. App. Amarillo 1987), *writ denied* (March 22, 1989); RCT Oil and Gas Docket No. 10-87,017, Amended Final Order Adopting and Clarifying Rules and Regulations for the Panhandle Carson County Field etc. (March 20, 1989) ("Final Order") *appeal docketed sub nom., Texaco Inc. v. RCT* Cause No. 465642 (98th District Court, Travis County, Texas) (Pet. App. Vol. 3 at E-1 to E-34)); and instead looked to the Texas statutory definition of casinghead gas to determine what is and what is not casinghead gas.

tion. However, FERC's examination of Texas law and facts about Panhandle Field geology and wells hardly constitutes federal regulation of production prohibited by NGA § 1(b). To the contrary, FERC specifically deferred to and accommodated the RCT's regulation of production, and FERC's decision is limited to matters of wellhead sales, dedication, and abandonment under its separate and exclusive federal jurisdiction.

FERC did not intrude into an area reserved to the states merely because facts concerning production activities were adduced and considered in the course of deciding whether producers violated NGA § 7(b) or NGPA § 504. In a host of cases regarding, for example, unlawful abandonment,[14] lease sales,[15] area and national rates,[16] pipeline rates and certificates,[17] and many other matters,[18] the production or gathering exemption of NGA § 1(b) has not been an impediment to FERC's examination of

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[14] *United Gas Pipe Line Co. v. McCombs*, 442 U.S. 529 (1979); *San Salvador Development Co.*, 59 FPC 2262, 2266 (1977); *Sun Oil Co.*, 56 FPC 3735, 3742 (1976); *Cities Service Gas Co.*, 38 FPC 364, 411-414 (1967).

[15] *United Gas Improvement Co. v. Continental Oil Co.*, 381 U.S. 392 (1965); *El Paso Natural Gas Co. v. Sun Oil Co.*, 708 F.2d 1011 (5th Cir. 1983); *Continental Oil Co. v. FPC*, 370 F.2d 57 (5th Cir. 1966), *cert. denied*, 388 U.S. 910 (1967).

[16] *See, e.g., Area Rate Proceeding (Permian Basin)*, 34 FPC 159, 189, 322, and 357 (Opinion No. 468 1965), *aff'd, Permian Basin Area Rate Cases*, 390 U.S. 747 (1968); *Area Rate Proceeding (Southern Louisiana Area)*, 40 FPC 530, 791-796 (Opinion No. 546 1968), *Southern Louisiana Area Rate Cases*, 428 F.2d 407 (5th Cir.), *cert. denied*, 400 U.S. 950 (1970); *Area Rate Proceeding (Hugoton-Anadarko Area)*, 44 FPC 761, 828, 939 (Opinion No. 586 1970), *aff'd Hugoton-Anadarko Area Rate Case*, 466 F.2d 974 (9th Cir. 1972).

[17] *Columbia Gas Transmission Corp.*, 10 FERC (CCH) ¶ 63,025 (1977), *rev'd on other grounds*, 10 FERC (CCH) ¶ 61,124 (1980); *Columbia Gas Transmission Corp.*, 56 FPC 1083 (1976); *Northern Natural Gas Co.*, 53 FPC 776, 781 (1975).

[18] *Union Oil Co. of California v. FPC*, 542 F.2d 1036 (9th Cir. 1976); *Superior Oil Co. v. FERC*, 563 F.2d 191, 196 (5th Cir. 1977).

information about subsurface facts, including geology and reservoir characteristics, and production activities. The oil operators cannot escape the consequences of their unlawful acts under federal law by claiming the production and gathering exemption makes those acts immune from FERC examination; NGA § 1(b) is not a refuge for illegal practices.

The RCT's citations to *Shell Oil Co. v. FERC*, 566 F.2d 536 (5th Cir. 1978), *aff'd*, 440 U.S. 192 (1979), and *Panhandle Eastern Pipe Line Co. v. TXO Production Corp.*, 34 FERC (CCH) ¶ 61,292 (1986), *reh'g denied*, 36 FERC (CCH) ¶ 61,182 (1986), do not support petitioners' § 1(b) arguments. RCT at 15. Unlike in *Shell*, in which FERC's predecessor, the Federal Power Commission, attempted to implement a rule requiring producers to maintain production capability in a certain manner, Opinion No. 239 does not prescribe or dictate the oil operators' drilling, completion, or production practices.[19] FERC did, however, prescribe the pricing consequences and service obligations that attach as a matter of federal law to the gas sold by the oil operators from their Panhandle Field wells. In *Panhandle*, FERC refused to entertain the pipeline's complaint because, unlike this case, the gas at issue was not committed or dedicated to interstate commerce. Furthermore, *Panhandle* did not involve any NGPA pricing questions as this case does.

A further extension of petitioners' NGA § 1(b) argument is their contention that FERC should have deferred to state tribunals on questions of state law. Although in the proceedings below it was never entirely clear to whom FERC should have deferred, presumably petitioners

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[19] The RCT incorrectly states that "[m]ost, if not all of the acts and practices which FERC found to be illegal involve the 'drilling and spacing of wells and the like' . . . . The illegal acts cited by FERC involved completion techniques, perforation practices, well spacing, well classification, and related matters" (citation omitted). RCT at 16. FERC made no such findings nor did it cite to any such "illegal" acts.

would have had FERC wait for the conclusion of the various title actions in the state courts or the RCT's separate proceedings. Petitioners' arguments are founded on erroneous factual and legal premises.

The RCT incorrectly says FERC adjudicated and decided state law issues. RCT at 24. FERC applied state law as appropriate in deciding federal law questions. Further, the RCT asserts that the Texas law to which FERC referred was "unresolved." RCT at 23.[20] FERC, however, found state law to be unambiguous, as have the court of appeals, the state courts, and the RCT.[21] The RCT also contends that the "same and related issues were pending before Texas state courts and the [RCT]." RCT at 24. Again, the RCT is incorrect. As discussed more fully *infra* at pp. 20-24, FERC, the courts, and the RCT each addressed separate issues under each tribunal's separate and exclusive jurisdiction.

The RCT also has misapplied the law regarding abstention. Abstention is an extraordinary and narrow exception to the duty of a federal court (or, in this instance, federal agency) to adjudicate a controversy properly before it. Only in a few very limited, exceptional circumstances is deferral to a state tribunal warranted. *Colorado River Water Conservation District v. U.S.*, 424 U.S. 800, 813-124 (1976); *Ramos v. Lamm*, 639 F.2d 559, 564 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981). As stated in *Baggett v. Bullitt*, 377 U.S. 360, 375 (1964):

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[20] However, even if FERC found that there is a genuine ambiguity in Texas law (which it did not), the clarification of which may conflict with subsequent state interpretations, abstention still is unwarranted. "The mere potential for conflict in the results of adjudication, does not, without more, warrant staying the exercise of federal jurisdiction." *Colorado Water Conservation District v. U.S.*, 424 U.S. 800, 816 (1976). *See also Zablocki v. Redhail*, 434 U.S. 374, 380 n.5 (1978) ("There is, of course, no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy.").

[21] *See* n.13, *supra* at p. 13.

> The abstention doctrine is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law; it rather involves a discretionary exercise of a court's equity powers.

Here, the decision to abstain in deference to state tribunals is committed to the discretion of FERC.

Abstention may be appropriate if a state court determination of pertinent state law will moot the federal issues. *Colorado River Water Conservation District*, 424 U.S. at 184. That situation does not exist here. Title decisions by the courts will not resolve the NGA and NGPA questions adjudicated by FERC. Deferral to the RCT likewise would have been inappropriate. No RCT proceeding, past or present, could have mooted the dedication and pricing issues arising under the NGA and NGPA. The principal question facing the RCT in its proceeding regarding refrigeration units was whether natural gasoline manufactured by those units could be counted as crude oil for well classification purposes. *See Hufo Oils v. Railroad Commission of Texas*, 717 S.W.2d at 407. Although some of the operators involved in the FERC proceeding utilized refrigeration units, others did not, and the propriety of the use of refrigeration units was never an issue before FERC.[22] More importantly, even had the RCT sanctioned the use of refrigeration units for well classification purposes, FERC still would have been faced with the identical dedication and pricing questions.[23] Nor can RCT Docket No. 10-87,017 be used

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[22] *Stowers Oil & Gas Co.*, 27 FERC (CCH) ¶ 63,048 at 65,189 (1984) ("I definitely do not intend for this proceeding to duplicate the litigation before the Texas Railroad Commission . . . on the legality of counting extracted natural gas liquids as crude oil in calculating gas-oil ratios."). App. at 69a, 71a.

[23] It is important to note that even though the RCT commenced its inquiry into the refrigeration unit question in 1981, several years before the FERC proceeding, the RCT was not a party to the FERC proceeding until after FERC had rendered its decision in 1985. The RCT specifically informed the Texas Attorney General in 1984 that it did not wish to participate before FERC. Even after requesting FERC to refrain from issuing Opinion No. 239,

to bolster petitioners' deferral arguments. That proceeding was convened in 1986 to determine whether the Panhandle Field rules should be changed prospectively. Prospective changes in the field rules have no bearing on the oil operators' past practices.

Simply because FERC discussed and referred to state statutes and regulations does not justify abstention. As stated by this Court in *Ramos*:

> It is true . . . that the district court did discuss and interpret several state statutes . . . . However, resolution of these state law questions does not mandate the conclusion that the district court should have abstained from deciding this case . . .

639 F.2d at 564 (citations omitted). Moreover, the "mere difficulty of state law does not justify a federal court's relinquishment of jurisdiction." *Louisiana Power & Light Co. v. City of Thibodeaux*, 360 U.S. 25, 27 (1959). Indeed, this Court recently observed that:

> While *Burford* is concerned with protecting complex state administrative processes from undue federal interference, it does not require abstention whenever there exists such a process, or even in all cases where there is a "potential for conflict" with state regulatory law or policy. *Colorado River Water Conservation Dist.*, 424 U.S. at 815-816.

New Orleans Public Service, Inc. v. Council of City of New Orleans, —— U.S. ——, 109 S. Ct. 2506, 2514 (1989). Nor is abstention required simply because a state court could entertain the same issues as the federal forum. *Ramos v. Lamm*, 639 F.2d at 564. Only where local interests predominate when compared to federal interests should the federal tribunal step aside. *Robert-Gay Energy Enterprises v. State Corp. Comm.*, 753 F.2d 857 (10th Cir. 1985).

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the RCT declined FERC's invitation to explain how FERC's ruling would affect the RCT's responsibilities. 32 FERC (CCH) ¶ 61,043 at 61,134. FERC certainly did not abuse its discretion for failing to defer to a state agency when that agency refused to inform FERC as to why it should defer.

Unlike *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and its progeny as cited by petitioners, the federal government obviously has a substantial, legitimate interest in the enforcement of the NGA and NGPA.[24] The NGA and NGPA represent a comprehensive regulatory scheme, and Congress preempted any conflicting state law or regulation. *Northern Natural Gas Co. v. State Corp. Comm.*, 372 U.S. 84 (1963); *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board*, 474 U.S. 409 (1986). The state may not encroach, even through conservation measures, upon preemptive federal legislation. *Oklahoma v. FERC*, 494 F. Supp. 636 (W.D. Okla. 1980), *aff'd*, 661 F.2d 832 (10th Cir. 1981), *cert. denied*, 457 U.S. 1105 (1982). Thus, when faced with dedication and pricing issues arising under the NGA or NGPA, courts frequently refer those matters to FERC as the agency with primary jurisdiction. *Texas Oil & Gas Corp. v. Michigan Wisconsin Pipe Line Co.*, 601 F.2d 1144 (10th Cir.), *cert. denied*, 444 U.S. 991 (1979); *Texas Oil & Gas Corp. v. Valley Gas Transmission, Inc.*, 608 F.2d 231 (5th Cir. 1979).

The issues confronting FERC—dedication and pricing—are central to FERC's statutory responsibilities. All "first sales" of natural gas, both in interstate and intrastate commerce, fall under FERC scrutiny. *See* NGPA §§ 2(21) and 504, 15 U.S.C. §§ 3301(21) and 3414. (App. at 16a and 39a). In addition, committed or dedicated gas remains subject to FERC's jurisdiction unless and until it is removed from that status by NGPA 601, 15 U.S.C. § 3431 (App. at 44a). FERC properly went forward to decision on these federal law issues and did

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[24] For example, in *Burford*, Sun Oil Co. attacked the validity of an RCT order granting Burford a drilling permit by bringing an injunctive action in federal district court. Jurisdiction of the federal court was invoked because of diversity of citizenship and because of a claimed denial of due process of law. No other federal interest was alleged. By contrast, FERC did not attempt to enjoin any action by the RCT or the state courts; FERC acted to enforce federal law and protect federal rights.

not abuse its discretion in declining to defer to state authorities.

Finally, the RCT's deferral argument is now moot. Since FERC's orders were issued in 1985, both the state courts and the RCT have issued decisions in the proceedings to which FERC supposedly should have deferred. Those decisions are entirely consistent with FERC's actions. Thus, if FERC had deferred and then later addressed the NGA and NGPA issues identified in the show cause order, that later result would have been the same as the result reached in Opinion No. 239.

III. Opinion No. 239 does not conflict with Texas law or the RCT's regulation of the Panhandle Field.

The RCT makes the bald assertion that FERC improperly interpreted Texas law and that FERC's interpretation conflicts with its own. RCT at 17-20. Yet despite the numerous state court and regulatory proceedings involving the Panhandle Field that have come to final resolution over the past several years, the RCT does not cite any decision that even suggests a conflict between it and Opinion No. 239. The reason for this is simple: There are none. This also was the conclusion of the court of appeals. 874 F.2d at 1334-35.

The same or similar facts that gave rise to FERC's show cause proceeding also gave rise to title suits in state and federal courts, primary involving gas rights owners (such as Dorchester) suing oil operators for conversion of natural gas, as well as to two separate regulatory proceedings before the RCT, one involving the refrigeration unit question, discussed *supra* at p. 3 n.5, and the other involving prospective changes to the Panhandle Field rules.[25] Each of these bodies, however, acted within its own exclusive sphere of jurisdiction: FERC over questions of pricing and dedication to interstate commerce; the courts over title disputes; and the RCT over matters relating to conservation and waste. *See, e.g.*,

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[25] Final Order (Pet. App. Vol. 3 at E-1 to E-34).

Amarillo Oil Co. v. Energy-Agri Products, Inc., 1989 Westlaw 19057, No. C-6649 (Tex. March 8, 1989). FERC and the Texas courts acted adjudicatively and retrospectively, while the RCT in its Panhandle Field rulemaking proceeding acted legislatively and prospectively. Not surprisingly, and contrary to the RCT's contentions, the decisions of all these forums are entirely consistent and harmonious, particularly with regard to issues such as the definition of casinghead gas and the RCT's historical regulation of the Panhandle Field as separate oil and gas fields divided vertically at the gas-oil contact.[26]

The RCT also fails to state that in its recent Panhandle Field hearings its own examiners acknowledged FERC's findings and conclusions in Opinion No. 239 but did not even suggest that there was any conflict between FERC's decision and their own. In describing the scope of the FERC proceeding, the examiners stated: "Of primary concern [to FERC] were the alleged violations of the NGPA § 104, which effects a ceiling price (§ 104) for gas dedicated to interstate commerce . . . ."[27] Neither the examiners in their proposed decision nor the RCT in its Final Order makes any mention of what the RCT now characterizes as "two inconsistent regulatory schemes," "misinterpretation" and "misapplication" of Texas law, or "preemption" of the state's "examination and resolution" of important state regulatory issues. RCT at 19-20. Presumably, had those matters been a legitimate concern to the RCT, that agency would have addressed them in its Panhandle Field Final Order.

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[26] The court of appeals discussed these several decisions in detail. 874 F.2d at 1333; *see also Amarillo Oil Co. v. Energy-Agri Products, Inc.*, slip op. at 12; *Dorchester Gas Producing Co. v. Harlow Corp.*, 743 S.W.2d at 250-251; Final Order Findings of Fact 6, 7, 22, 23, and 24; Conclusions of Law 5, 6, 7, and 8; and Oil Field Rules, Rule 1 (Pet. App. Vol. 3 at E-3 to E-14).

[27] RCT Oil and Gas Docket No. 10-87,017, Proposal for Decision at 14 (App. at 72a, 94a-96a). The RCT's Final Order adopted and affirmed the examiners' proposal with slight modification.

The only purported example of inconsistency between FERC's Opinion No. 239 and the RCT's Final Order is cited at page 18 of the RCT's petition. There, the RCT states:

> The FERC approach and the Texas approach to regulation of production from the Panhandle fields are not harmonious. In Opinion No. 239, FERC has made a rigid determination that each operator must identify the point of gas-oil contact in his wellbore and that casinghead gas is only that gas produced from below such point. Under FERC's approach a well having a gas-oil ratio exceeding 4146 cubic feet of gas per barrel of oil (4146:1) is improperly completed above the gas-oil contact and is taking gas that does not qualify as casinghead gas. 44 FERC ¶ 61,128 at 61,355 (1985). FERC's arbitrary determination is based on FERC's conclusion that gas-oil ratios above 4146:1 indicate improper production from a dry gas horizon.

What the RCT does not say, and what is misleading about the quoted paragraph, is that the RCT's citation is not to Opinion No. 239. Rather, it is to the Commission's Phase 2 order, which was not before the court of appeals and which is not before this Court. There is no mention anywhere in Opinion No. 239 of a gas-oil ratio of 4146 cubic feet per barrel or of any other FERC-imposed "absolute and fixed standard" or "production constraint" as alleged by the RCT.

Furthermore, even if FERC's Phase 2 order is taken into account here, the RCT has completely misrepresented the nature of the evidence utilized by FERC in its Phase 2 proceedings.[28] FERC's task in Phase 2 was to quantify how much of the gas sold by the oil operators was casinghead gas and how much was not. In Opinion No. 307, *Stowers Oil & Gas Co.*, 44 FERC (CCH) ¶ 61,128 (1988), FERC adopted the methodology of the expert witness sponsored by the Enforcement Staff,

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[28] The RCT did not participate in Phase 2.

Northern, and Dorchester. He analyzed the casinghead gas production of hundreds of oil leases and wells adjacent or in proximity to the oil operators' leases. He then calculated the cumulative gas-oil ratio of these leases, *i.e.*, the total volume of casinghead gas produced from these leases over their entire lives in relation to the total amount of crude oil produced over the same period. The result was 4146 cubic feet of casinghead gas per barrel of crude oil. This number then was used to quantify the oil operators' casinghead gas production over the lives of their leases (typically from about 1980 through 1985). The 4146 cubic feet per barrel figure was not used by FERC as an instantaneous or producing gas-oil ratio to indicate compliance with field rules (as is the 5000 to 1 ratio cited by the RCT), nor was it used as any sort of FERC-imposed future production standard. It was nothing more than a tool utilized by a witness to arrive at his expert conclusion in the context of an evidentiary proceeding.

The RCT's comparison of the methodology approved by FERC in its Phase 2 proceedings to the presumptions set forth in its own Final Order is meaningless. The presumptions cited by the RCT (RCT at 19) are just that, rebuttable presumptions, prospective only, and indicating presumed compliance with the RCT's revised field rules. *See* Final Order, Appendix 1 (Pet. App. Vol. 3 at E-29 and 30). The field rules, however, remain clear:

> Panhandle Field oil wells are restricted to completion in horizons bearing producible oil. . . . No person in possession of or operating an oil well may produce from the oil well gas found in a horizon productive of gas only.

Final Order, Oil Field Rules, Rule 1 (Pet. App. Vol. 3 at E-14).[20] There is absolutely no inconsistency between

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[20] This is a restatement of existing law, not a revision of the field rules. *See, e.g.*, Final Order, Findings of Fact 24 and Conclusions of Law 5. (Pet. App. at Vol. 3 at E-8 and E-12).

these rules and FERC's findings, either in Phase 1 or Phase 2.[30]

The RCT cannot create a conflict where none exists by simply saying it is so. The best and only reliable expression of Texas law is that expressed by the Texas statutes, rules, and regulations; the decisions of the RCT; and the decisions of the Texas courts, all of which are consistent with FERC's actions below. Moreover, the RCT, despite its complaints here, proceeded unencumbered to reconsider and revise its own rules and has placed those rules into effect without incident or hindrance from FERC.

IV. Petitioners' criticism of FERC's findings regarding NGPA § 103 do not create a reviewable issue.

Petitioners also claim that FERC's findings regarding the scope of the oil operators' NGPA § 103 well category determinations intruded on the state's authority to define NGPA proration units and circumvented the procedures of NGPA § 503, 15 U.S.C. § 3413 (App. at 31a). Petitioners obviously disagree with the court of appeals' conclusion that FERC acted properly in examining the scope of the oil operators' § 103 determinations, but disagreement with a lower court's decision, without more, is not a sufficient reason for certiorari review.

NGPA § 103 establishes the ceiling price for "new, onshore production wells." A new, onshore production well is defined as any well (1) the surface drilling of which began on or after February 19, 1977, (2) which statisfies applicable well-spacing rules, and (3) which is not within an existing proration unit. "Proration unit" is defined under NGPA § 2(8) as that portion of a reservoir that the jurisdictional agency (here, the RCT) determines can be effectively and efficiently drained by

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[30] Significantly, no oil operator has argued that it is presumptively in compliance with the RCT's field rules according to the presumptions set forth in the RCT Final Order and that, as a result, FERC's decision must conflict with the RCT Final Order.

a single well, 15 U.S.C. § 3301(8) (App. at 14), *i.e.*, one proration unit, one well.[31]

FERC strictly adhered to this statutory scheme. FERC found that the oil operators had obtained from the RCT valid, administratively final, § 103 well category determinations. Those determinations, however, covered only casinghead gas. They did not cover gas other than casinghead gas—the same gas that would otherwise be produced by Dorchester from the proration units assigned to its gas wells. FERC further found that under existing state statutes and regulations these oil and gas proration units are separated vertically at the gas-oil contact. Thus, FERC gave full effect under the NGPA to the state's longstanding practice of separately prorating the Panhandle gas and oil fields. Final Order, Findings of Fact 6, 7, and 22 (Pet. App. Vol. 3 at E-3 and E-8).

Petitioners contend that FERC's findings regarding the scope of the oil operators' § 103 determinations constitute an unlawful circumvention of the reopening procedures established under NGPA § 503(d), 15 U.S.C. § 3413(d) (App. at 35a). Petitioners further assert that until the oil operators' determinations are reopened and vacated, FERC has no jurisdiction over the oil operators' gas sales by virtue of NGPA § 601(a)(1)(B)(iii), 15 U.S.C. § 3431(a)(1)(B)(iii) (App. at 44a).

FERC did not seek to reopen the oil operators' NGPA § 103 well category determinations, as no purpose would have been served by doing so. The oil operators obtained

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[31] The RCT is wrong in asserting that a proration unit is just the surface acreage assigned to a well. Under the NGPA, a proration unit relates to a subsurface accumulation of natural gas—a portion of a reservoir. *See also* NGPA § 2(6) for the definition of "reservoir." 15 U.S.C. § 3301(6) (App. at 14a). The RCT recognizes this fact in its Final Order: "Production of unnecessary upper gas interval gas through Panhandle Field oil wells drains reserves which properly lie within the assigned proration units of West and East Panhandle gas wells." Final Order Findings of Fact 20 (Pet. App. Vol. 3 at E-7).

valid NGPA § 103 well category determinations for sales of casinghead gas, and their sales of casinghead gas at NGPA § 103 prices were not unlawful under § 504 of the NGPA. FERC had no reason, therefore, to reopen those determinations. However, the oil operators did not obtain any well category determinations for their sales of gas other than casinghead gas; for such sales, there were no determinations to reopen.[32]

Petitioners' arguments are premised on an incorrect "all-or-nothing" view of NGPA § 103. Well category determinations are completion location specific, not well specific. As the Fifth Circuit has observed:

> When Congress was concerned with depth of production, completion location was a proper focus since it is a point of production from the well bore.
>
> * * * *
>
> That a well may produce gas that qualifies under two different pricing provisions is a result of the limited use of completion location as the qualifying unit of production in sections 102 and 103.

Ecee Inc. v. FERC, 645 F.2d 339, 355-56 (5th Cir. 1981). Further, FERC's rules specifically provide that if a producer obtains a NGPA § 103 well category determination but completes the well in a second proration unit not considered in the prior determination, the prior determination does not serve to qualify gas produced from the second proration unit for NGPA § 103 pricing. *Clarification of Regulations Regarding New, Onshore Production Wells*, Order No. 149, FERC Stats. and Regs. (CCH) ¶ 30,257 at 31,571 (1977-81); 46 F.R. 29697 (June 3, 1981); 46 F.R. 32237 (June 22, 1981).

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[32] For regulatory purposes the Panhandle Field is not classified by the RCT as a single field but divided into separate oil and gas fields. *See* Final Order Findings of Fact 6 and 7 (Pet. App. Vol. 3 at E-3 to E-4). The oil operators obtained their NGPA § 103 classifications for casinghead gas produced from the Panhandle Oil Field, not from the Panhandle Gas Field.

Thus, FERC was on sound footing in not reopening and vacating any of the oil operators' NGPA § 103 well category determinations. FERC gave full effect to these determinations and was not obligated to proceed in this case under NGPA § 503. Likewise, because only the oil operators' sales of casinghead gas were subject to NGPA § 103, only these sales were removed from FERC's NGA jurisdiction under NGPA § 601(a)(1)(B). FERC properly exercised its continuing NGA jurisdiction over the oil operators' sales of gas other than casinghead gas, *i.e.*, their sales of old gas previously dedicated to interstate commerce.

V. The oil operators' retroactive penalty argument is not properly subject to review by this Court.

The oil operators contend that FERC's findings below impose a retroactive penalty upon them. Oil Operators at 17-18. However, the FERC orders affirmed by the court of appeals in this case dealt only with the question of whether violations occurred. FERC found that the oil operators violated federal law and ordered them to cease those violations. The question of appropriate remedies was left for Phase 2. As noted previously, FERC only recently completed Phase 2, and its Phase 2 orders were not reviewed by the court of appeals in *Walker Operating Corp. v. FERC*. Accordingly, the oil operators' retroactive penalty arguments should be dismissed as unreviewable.

VI. The proceedings below were fair; the oil operators' due process rights were not violated.

The oil operators claim that they were denied their due process rights because the show cause order and Enforcement Staff's direct evidence assertedly did not disclose the Staff's theory of the case. Oil Operators at 18. The court of appeals summarily disposed of this argument, and the oil operators fail to demonstrate that the court erred or why this Court should review the merits of their argument.

The oil operators are incorrect in their characterization of FERC's show cause order and the evidentiary proceedings before the presiding ALJ. The oil operators take an overly restrictive view of what a show cause order must contain; in essence, they argue that it must provide the very exactitude that the subsequent hearing was supposed to provide. However, the show cause order was only a preliminary step commencing a lengthy administrative proceeding. All that is necessary of such an order is that the oil operators have sufficient and adequate notice of the nature of the proceeding.

There can be no question that the oil operators had ample notice of the issues to be adjudicated in the FERC proceeding and the nature of the violations of federal law they were alleged to have committed. The oil operators can claim neither surprise nor prejudice in connection with the evidence adduced at the hearing. They cannot point to any direct evidence which does not directly relate to the allegations in the show cause order. They cannot point to any rebuttal evidence which does not directly relate to matters and defenses raised in the direct testimony of their own witnesses. They had the opportunity to confront each witness sponsored by their opponents and utilized every such opportunity to advance their theory of the case. Indeed, as the record unequivocally shows, the ALJ afforded them tremendous latitude in presenting their defense in the manner in which they saw fit.

The oil operators now say that they apparently misread the show cause order. They say the order alleged that the brown dolomite formation is not productive of oil anywhere in the entire field. This reading of the order purportedly led them astray in selecting witnesses and presenting their case. Oil Operators at 18-19. Contrary to the oil operators' claim, however, the show cause order said no such thing. Paragraph 29 of the order stated:

> The brown dolomite stratum is productive only of dry gas at the level at which the operators of each

> of the oil wells identified in Appendix A have perforated or have caused the performation of such oil wells.

Stowers Oil & Gas Co., 26 FERC (CCH) ¶ 61,207 at 61,478 (App. at 56a). This is precisely what the direct testimony of the Staff demonstrated. That the oil operators chose to ignore this very clear language and pursued a different theory of the case cannot reasonably be said to be an error on FERC's part.

Nor is it accurate for the oil operators to contend that they were surprised by a "new theory" that Staff made at the eleventh hour. Oil Operators at 19. Neither the Staff witnesses' testimony regarding oil production nor the particular testimony the oil operators now most strenuously complain of—that of the Railroad Commission's ex-Chief Director, Mr. Harris—propounded any new theories. Rather, that evidence properly rebutted the oil well operators' arguments that all of their gas was casinghead gas under Texas law. What Staff demonstrated was that the oil well operators' witnesses were wrong in their views of how the field was divided into gas and oil proration units and wrong in their claim that oil found anywhere in the Panhandle Field's brown dolomite formation made all of their gas casinghead gas entitled to NGPA incentive prices. This is exactly what rebuttal evidence is supposed to do, and the ALJ's decision not to permit surrebuttal testimony did not violate any due process requirements.

The oil operators couch their claim in due process terms, but in essence it is little more than a complaint about the nature of some of the rebuttal evidence in an investigatory proceeding. The trier of fact in such proceedings normally is accorded wide latitude in resolving evidentiary disputes and rarely does the resolution of those disputes engender a question worthy of review by this Court. *See, e.g., Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 619-20 (1966). It certainly

does not do so here. The court of appeals ruled on oil operators' contention and they do not point to any unusual circumstance or conflict which merits further review.

CONCLUSION

For the foregoing reasons, the petitions for writ of certiorari should be denied.

Respectfully submitted,

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